International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, Local 720, AFL-CIO and Steven Lucas. Case 28-CB-4351

September 12, 2000 DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS LIEBMAN AND HURTGEN

On June 25, 1996, Administrative Law Judge Michael D. Stevenson issued the attached decision. The Respondent Union filed exceptions and a supporting brief. The General Counsel filed limited exceptions, a supporting brief, and an answering brief.¹

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions, limited exceptions, and briefs and has decided to affirm the judge's rulings,² findings,³ and conclusions only to the extent consistent with this Decision and Order.

The judge found that the Union violated Section 8(b)(1)(A) and (2) of the Act by breaching its duty of fair representation when it permanently barred Steven Lucas, the Charging Party, from using its exclusive referral system since on or about March 22, 1995. The Union argues, inter alia, that no such breach occurred because it was not legally obligated to dispatch Lucas and reconsider his 1994 expulsion from its hiring hall system. For the reasons stated below, we find merit in this argument, and we shall dismiss the complaint.⁴

I. FACTS

The Respondent Union operates an exclusive hiring hall for employees and employers in the Las Vegas, Nevada area. From 1980 until May 1994, former union member Steven Lucas was referred out for employment

¹ The General Counsel filed a motion to strike certain portions of the Respondent's brief. We deny this motion for lack of merit.

through the Union's hiring hall.⁵ Beginning on about May 6, 1994, the Union refused to refer Lucas to any more job assignments. On May 16, 1994, Lucas filed a charge (Case 28-CB-4137) that alleged as unlawful, inter alia, the Respondent's refusal to refer him. about May 19, 1994, the Respondent's executive board permanently expelled Lucas from its hiring hall on the ground that he had engaged in "alleged misconduct in relation to fellow employees, employers, and clients" over a 15-year period. On June 30, 1994, the Acting Regional Director refused to issue a complaint on Lucas' May 16 charge, finding that the Respondent's decision not to dispatch Lucas was based only on the complaints it had received about his behavior while at the Union's hall and while employed by signatory employers. Lucas did not appeal this dismissal.

The present case arose about 10 months after Lucas' expulsion from the hiring hall. On March 3, 1995, Lucas sent a letter to Union President Dennis Kist, explaining that he had attempted to sign in for referral but had not been dispatched, and listing the job classifications for which he was available. Attached to Lucas' March 3 letter was a letter written by a clinical psychologist employed by the county health department, Lynn D. Larson, Ph.D. The letter stated that Lucas had volunteered for, and been subjected to, psychological testing, and that "none of the test results revealed signs of psychopathology." Larson's letter added that there "should be no reason, from a psychological stand point, that Mr. Lucas should not be considered fit and able to be employed at this time."

At about the same time (i.e., in early March 1995), Lucas contacted AVW Audio Visuals, Inc. (AVW), an employer with a contract with the Union, and informed AVW of his availability for work at the upcoming National Association of Broadcasters convention in Las Vegas. Consequently, on March 22, 1995, AVW requested Lucas and several other employees by name from the hiring hall to work at the National Association of Broadcasters convention. Lucas was not referred to AVW or to any other job on the grounds that he had been permanently expelled from the Union's hiring hall in May 1994.

II. ANALYSIS

As a threshold matter, we agree with the judge's rejection of the Respondent's defense that the complaint is barred by Section 10(b) of the Act. On March 16, 1995, Lucas filed the instant charge alleging violations of Section 8(b)(1)(A) and (2) of the Act.⁶ The Respondent con-

² The judge found that the Respondent failed to fully comply with the General Counsel's subpoena duces tecum. We do not adopt this finding and the adverse inference which the judge drew from the Respondent's purported noncompliance. The record indicates that some documents subpoenaed may not have actually existed, while other documents requested by the General Counsel were rendered moot in light of the parties' stipulations received by the judge.

³ In view of our dismissal of the case, we find it unnecessary to consider those issues discussed in sec. III,B,3 of the judge's decision concerning the Charging Party's alleged theft of union documents kept at the Respondent's hiring hall.

⁴ Upon careful review of the record, we find no merit in the General Counsel's argument that the Respondent's assertion that it has not breached its duty of fair representation must fail procedurally.

⁵ Lucas withdrew his membership in the Union in 1992.

⁶ The charge states, in pertinent part:

tended that the March 16, 1995 charge is, in effect, equivalent to the May 16, 1994 charge dismissed by the Acting Regional Director because both charges attack the Respondent's expulsion of Lucas from the hiring hall. In finding that the complaint is not time-barred, we rely solely on the fact that the March 1995 charge challenges a separate event that occurred within 6 months of the filing of the charge. Unlike the May 16 charge, the March 16 charge does not challenge, nor did the General Counsel seek to litigate, whether the Respondent had adequate justification in May 1994 to remove Lucas from its hiring hall referral system. Rather the focus of the March 16 charge is conduct engaged in by the Respondent in or after March 1995, i.e., the Respondent's refusal to grant Lucas' request for readmission to the hiring hall.

Turning to the merits of the complaint, however, we disagree with the judge's finding that the Respondent violated Section 8(b)(1)(A) and (2) by refusing to refer Lucas out of its hiring hall in March 1995. In reaching this conclusion, we are guided by certain wellestablished legal principles pertaining to a union's operation of a hiring hall. As an operator of an exclusive hiring hall, a union has a duty of fair representation to applicants using its hall. See Breininger v. Sheet Metal Workers Local 6, 493 U.S. 67 (1989). As part of this duty, the union must operate its exclusive hiring hall in a manner that is not "arbitrary or unfair." See Miranda Fuel Co., 140 NLRB 181, 184 (1962). "[T]he rule announced in Vaca v. Sipes, 386 U.S. 171, 190 (1967) that a union breaches its duty of fair representation if its actions are either 'arbitrary, discriminatory, or in bad faith'-applies to all union activity . . . [A] union's actions are arbitrary only if, in light of the factual and legal landscape at the time of the union's actions, the union's behavior is so far outside a 'wide range of reasonableness' . . . as to be irrational." Air Line Pilots v. O'Neill, 499 U.S. 65, 67 (1991). A union is permitted a wide range of reasonableness in operating its hiring hall, "subject always to complete good faith and honesty of purpose in the exercise of its discretion." Ford Motor Co. v. Huffman, 345 U.S. 330, 338 (1953). A union may bar applicants from its referral system based on legitimate business considerations and absent proof of a statutorily proscribed objective. See Longshoremen ILA Local 341 (West Gulf Maritime Assn.), 254 NLRB 334 (1981).

"To be sure," as we have recently affirmed, "the Board in numerous cases has found violations of Section

During the last 6 months, and continuing to date, [the Respondent Union] has operated its hiring hall in an unlawful and discriminatory manner, including barring Steven Lucas from use of the hiring hall and arbitrarily denying him work referrals.

8(b)(2) and (1)(A) when unions failed to follow established hiring hall procedures or made referrals on the basis of purely subjective criteria, even when the conduct complained of was not based on the discriminatee's membership or nonmembership in the union." *Plumbers* Local 342 (Contra Costa Electric), 329 NLRB 688, 691 (1999). In these hiring hall cases, when a union prevents an employee from being hired or causes an employee's discharge, the Board has presumed that the effect of the union's action is to "encourage union membership" within the meaning of the Act⁷ because the union has displayed to users of the hiring hall its power over their livelihoods. "The Board has reasoned that in such cases, the unspoken message to all hiring hall users is that, despite what the rules say, the union—which controls their access to employment—can do as it pleases in awarding referrals, and that union considerations may therefore very well affect the ability of individuals to obtain favorable consideration in referrals." Id. This presumption may be overcome, however, if the interference with employment is pursuant to a valid union-security clause or "where the facts show that the union action was necessary to the effective performance of its function of representing its constituency." Operating Engineers Local 18 (Ohio Contractors Assn.), 204 NLRB 681 (1973), enf. denied on other grounds 496 F.2d 1308 (6th Cir. 1974).

There is no contention that the Respondent acted discriminatorily in refusing to refer Lucas in March 1995. Nevertheless, the Union did refuse to permit Lucas to register at its hiring hall. This action presumptively has the effect of "encouraging union membership." Thus, the issues presented to us here are whether the Respondent acted arbitrarily in refusing to permit Lucas to register at its hiring hall in March 1995, and whether the Union's conduct was necessary to the effective performance of its representative function. (There is no unionsecurity clause issue here.) We find that the Respondent did not act arbitrarily, and therefore did not violate the duty of fair representation owed to those who sought to use its hiring hall. Further, we find that the Respondent has demonstrated that its conduct was necessary to protect the representative role that it performs in administering an exclusive hiring hall.

Central to our analysis is the fact that Lucas was permanently expelled from the hall in May 1994 for 15

⁷ Sec. 8(b)(2) of the Act states that "[i]t shall be an unfair labor practice for a labor organization—to cause—an employer to discriminate against an employee in violation of subsection (a)(3)." Sec. 8(a)(3) provides, in pertinent part, that "[i]t shall be an unfair labor practice for an employer—by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." (Emphasis added.)

years of misconduct in relation to coemployees, employers, and clients. There is no contention that this 15-year record of misconduct was not connected with his use of the hiring hall. Nor does the General Counsel allege that his expulsion was unlawful.⁸ Indeed, as mentioned above, the General Counsel dismissed Lucas' charge making that allegation.⁹ Thus, this case involves the lawfulness of the Respondent's denial of a readmission application by an individual who was lawfully expelled from the hiring hall only 10 months earlier.

We recognize that the Respondent did not act pursuant to an explicit, written policy governing readmission to its hiring hall of persons permanently expelled. Whatever the wisdom in maintaining such rules, there is, however, no legal requirement that a union running a hiring hall maintain rules or a process governing readmission for those who have been expelled. In Teamsters Local 357 v. NLRB, 365 U.S. 667 (1961), the Board had sought to prescribe rules (the "Mountain Pacific" safeguards) for the operation of an exclusive hiring hall. The Supreme Court firmly rejected the Board's position, stating that "[i]f hiring halls are to be subjected to regulation that is less selective and more pervasive, Congress not the Board is the agency to do it." Id. at 677. The law therefore is clear that the Board cannot and should not dictate hiring hall rules for unions.

The critical inquiry therefore is whether the Respondent acted arbitrarily in its treatment of Lucas, because the Respondent's actions in operating its exclusive hiring hall must, of course, comport with the duty of fair representation. To establish "arbitrary" conduct, it is not enough to show errors in judgment, or that a more prudent union would have acted differently. To establish the arbitrary conduct necessary for a breach of the duty of fair representation, it must be shown that the union acted in a way that is "so far outside a 'wide range of reasonableness' . . . as to be irrational." *Air Line Pilots v. O'Neill*, 499 U.S. at 67.

The investigation established that the Union took the action because of complaints from Union agents, other registrants, and employers regarding your behavior at the Union hall or while employed by signatory employers. The Union, based upon these complaints, made a decision that it could no longer refer you for employment.

That showing has not been made here. The Respondent was presented with a 15-year record of Lucas' misconduct that formed the basis for his May 1994 expulsion from the hiring hall. As against that 15-year record, the General Counsel presents only the March 1995 letter from a psychologist sent 10 months after the expulsion. Even assuming arguendo that a reasonable person could find that the letter outweighed the 15-year record of Lucas' conduct, surely the opposite conclusion could just as reasonably be drawn. On its face, Larson's letter triggers no obligation on the part of the Respondent to reconsider Lucas' permanent expulsion from the hiring hall. Nor does the letter compel a conclusion that circumstances had changed so significantly in the prior 10 months that it would be totally irrational for the Respondent to fail to reconsider Lucas' permanent expulsion from the hiring hall. In short, we cannot find that the Respondent acted without a rational basis, and therefore arbitrarily, in concluding that Lucas had not provided adequate grounds for reversing its prior decision to refuse to refer him out of its hiring hall.

Further, we conclude that the Respondent has shown that its failure to refer Lucas was "necessary to the effective performance of its function of representing its constituency." At the outset, an element in evaluating whether the Respondent has made out a "necessity defense" is whether its conduct was arbitrary. See, e.g., *Radio-Electronics Officers Union v. NLRB*, 16 F.3d 1280, 1284–1285 (D.C. Cir. 1994), and cases cited. Here, we have found, applying the *O'Neill* Court's definition ("so far outside a 'wide range of reasonableness' . . . as to be irrational"), ¹⁰ that the Respondent did not act arbitrarily in refusing to refer Lucas in March 1995, only 10 months after having permanently expelled him from the hiring hall.

In Stage Employees IATSE Local 150 (Mann Theatres), 268 NLRB 1292, 1295 (1984), the Board held that a union did not violate Section 8(b)(1)(A) and (2) by refusing to refer an employee who had a history of misconduct and incompetence on various jobs to which he had been referred through the union's exclusive hiring hall. In finding that the union had overcome the presumption that its conduct effectively encouraged union membership, the Board stated:

We find that . . . the Respondent (union) used reasonable judgment, considering all that had transpired . . . in concluding that further referral of [the employee] would jeopardize its position as the exclusive supply of the employer's employees.

⁸ The General Counsel argues that the judge correctly drew an adverse inference from the failure of the Respondent to comply with a subpoena for documents concerning its expulsion of Lucas from the hiring hall. Because there is no contention that this expulsion was unlawful, those documents are not relevant to any issue presented in this case, and thus we do not adopt the judge's adverse inference.

⁹ In refusing to issue a complaint on Lucas' charge relating to his suspension from the hall, the Acting Regional Director informed Lucas that—

¹⁰ Air Line Pilots v. O'Neill, 499 U.S. at 67.

Similarly, we find here that the Respondent used reasonable judgment, considering Lucas' 15-year history of misconduct, in concluding that the effective operation of its hiring hall—with respect to both registrants and employers—required it to deny Lucas readmission to the hall. The Respondent reasonably determined, in light of Lucas' history of disrupting jobs, that signatory employers would resist the continued use of the hiring hall if it continued to refer him for work. See footnote 9, supra.

The fact that a single employer—AVW—requested Lucas by name for referral from the hiring hall does not compel a contrary finding. Under the Respondent's collective-bargaining agreement, an employer may request a particular employee only if the employee is on the referral list. Thus, the issue in this case is whether the Respondent could properly exclude Lucas from the list. If Lucas were on the list, he would be referable not only to AVW but also to other employers that subsequently used the hall to obtain employees. As discussed above, the Respondent would reasonably be concerned that the referral of Lucas to these employers could jeopardize the Respondent's reputation for referring competent and well-behaved employees. Thus, the AVW request does not undermine the Respondent's reasonable judgment that the situation had not changed sufficiently in the 10 months since Lucas' lawful expulsion from the hiring hall so as to compel his immediate reinstatement to the hiring hall. Given the complaints about Lucas that the Respondent had received over a period of many years from other employers, it was certainly justified in deciding that to reinstate him at that time could jeopardize the integrity of the hiring hall by risking relations generally with signatory employers. Similarly, the employees represented by the Respondent would understand that the continued exclusion of Lucas from the referral list was in their interests as hiring hall users and was a potential consequence of a record of misconduct, and not a naked exercise of raw power designed to intimidate them into closer adherence to the Respondent. We therefore do not believe that this single name request overcomes the legitimacy of the Respondent's action in refusing to readmit Lucas to the hiring hall and the refusal to refer him in March 1995. In these circumstances, we conclude that the Respondent was not acting to encourage union membership, but rather legitimately sought to promote the efficiency and integrity of its hiring hall operations.¹¹

Accordingly, we shall dismiss the complaint.

ORDER

The complaint is dismissed.

Nathan W. Albright and Scott B. Feldman, Esqs., for the General Counsel.

David A. Rosenfeld, Esq., of Oakland, California, for the Respondent.

DECISION

STATEMENT OF THE CASE

MICHAEL D. STEVENSON, Administrative Law Judge. This case was tried before me at Las Vegas, Nevada, on February 29, 1996, pursuant to a complaint issued by the Regional Director for the National Labor Relations Board for Region 28 on April 28, and which is based upon a charge filed by Steven Lucas (Charging Party or Lucas) on March 16. The complaint alleges that International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, Local 720, AFL–CIO (Respondent or Union) has engaged in certain violations of Section 8(b)(1)(A) and (2) of the National Labor Relations Act (the Act).

Issues

- (1) Whether this case is barred by Section 10(b) of the Act.
- (2) Whether Respondent violated its duty of fair representation and acted in an unfair, arbitrary or invidious manner by refusing to register Steven Lucas for its exclusive hiring hall so that Lucas could be referred out for work to AVW Audio, Inc. [AVW], an employer who had requested Lucas by name for employment, pursuant to a practice whereby an employer party to a collective-bargaining agreement with the Union is permitted to name request registrants for dispatch by the Union to the requesting employer.
- (3) Whether the merits of this case are affected and if so, how, by alleged misconduct of Lucas in stealing documents from his file at the Union, and/or by Respondent's failure to comply with the General Counsel's subpoena duces tecum.

All parties were given full opportunity to participate, to introduce relevant evidence, to examine and to cross-examine witnesses, to argue orally, and to file briefs. Briefs, which have been carefully considered, were filed on behalf of the General Counsel and Respondent.

On the entire record of the case, and from my observation of the witnesses and their demeanor, I make the following

FINDINGS OF FACT

I. THE EMPLOYER'S BUSINESS

I find that AVW Audio Visual, Inc. is a corporation, which operates a business renting and selling audio-visual equipment and related products and that it maintains an office and place of business located in Las Vegas, Nevada. Respondent admits that during the past year, ending March 16, in the course and conduct of its business, AVW's gross volume exceeded \$500,000, and that for the past year ending March 16, it purchased and received in interstate commerce, goods and materials valued in excess of \$50,000 directly from points located outside the State of Nevada. Accordingly, it admits, and I find that the Employer is engaged in commerce and in a business

¹¹ See Boilermakers Local 40 (Envirotech Corp.), 266 NLRB 432, 433 (1983).

¹ All dates herein refer to 1995 unless otherwise indicated.

affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

Respondent admits, and I find, that it is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. The Facts

1. Overview

The basic facts of this case are undisputed. Between 1981 and 1992, Lucas was a member in good standing with the Union. In 1992, Lucas took an honorable withdrawal from the Union. Notwithstanding this withdrawal, Lucas continued to be referred out for employment through Respondent's exclusive hiring hall, just as he had been since 1980. Then on or about May 6, 1994, Respondent refused to refer Lucas to any more job assignments. On May 19, 1994, according to Dennis Kist, a witness both for General Counsel and for Respondent, the executive board of the Union convened to discuss Lucas. Kist attended the meeting in his role as president of the Union, a title he no longer has.² After discussion among the 12-to-13 member executive board, it was resolved that Lucas should be expelled from the hiring hall as punishment for 15 years of alleged misconduct in relation to coemployees, employers and clients (Tr. 206).

Once Lucas learned of the executive board's action, he filed an unfair labor practice charge in Case 28–CA–4137 (filed May 16, 1994) against the Union. In the charge, Lucas alleged violation of Section 8(b)(1)(A) of the Act: (1) by refusing to dispatch nonmembers; (2) by refusing to accept a grievance from Lucas with respect to his termination by an employer; (3) by refusing to properly represent Lucas for the past 6 months; and (4) by refusing to dispatch Lucas (R. Exh. 1).

On June 30, 1994, the Board's Regional Office completed its investigation of Lucas' charge and the Acting Regional Director wrote Lucas a letter explaining that the Region had found no merit to the charge. In relevant part, the Acting Regional Director wrote,

Finally, the charge alleges that the Union refused to dispatch you on May 6. The investigation disclosed that the Union has decided that it will no longer permit you to be dispatched. The investigation established that the Union took the action because of complaints from Union agents, other registrants, and employers regarding your behavior at the Union hall or while employed by signatory employers. The Union, based upon these complaints, made a decision that it could no longer refer you for employment and, accordingly, advised you that it would not be dispatching you for employment. There is no evidence that the Union's decision was made as a result of your lack of membership or for any reason other than the complaints received by the Union regarding your behavior at the Union hall and while employed. In this regard, there is no

evidence that the Union has refused to dispatch any other non-member. I am, therefore, refusing to issue a complaint in this matter.

> Very truly yours, /s/ Robert A. Jackson Acting Regional Director

> > $[R. Exh. 2]^3$

There is no evidence that Lucas appealed the decision of the Acting Regional Director.⁴

2. AVW name requests Lucas for dispatch

The facts of this case skip forward several months to on or about March 3, when Lucas wrote a letter to Kist which letter reads as follows:

IATSE LOCAL 720 STAGEHANDS 3000 S. Valley View Blvd. Las Vegas, NV. 89102

President Dennis Kist Esq.,

I've made several attempts to sign in for work referral on this Union's out of work list but haven't been dispatch [sic] since May of 1994.

Please insure I am signed in, for I'm available to work in the following job classifications.

1. CAR LOADER	5. ASSISTAN
	PROPS
2. SPOTLIGHT OPE	6. ASSISTANT CAR
RA-	PEN-
TOR	TER
3. HEAD SOUND	7. ASSISTANT ELE
TECHNICIAN	CTRICIAN
4. ASSISTANT	8. VIDEO CAMERA
SOUND	MAN
	9. AV TECHNICIAN

COOPERATION IS APPRECIATED!

Fraternally,

/s/ Steven Lucas 3/03/95

STEVEN LUCAS

³ The decision of the Acting Regional Director was based in whole or in part on certain information submitted to him by the Union and union counsel. Some or all of this same information was gathered together by the General Counsel from the Region's closed file in Case 28–CB–4137 and appended to a document captioned, "Counsel for the General Counsel's Motion In Limine" (GC Exh. 1(n)), in which General Counsel asked me to bar certain evidence from the instant case. I took this motion under advisement and deferred ruling (Tr. 21). I find now that the motion is moot and that no ruling is required because the material the General Counsel sought to exclude from the record, has, for the most part, not been admitted. That is, the material appended to the motion in limine is, of course, part of the record. But the documents were not admitted in support of any substantive issue in this case.

² Kist currently is a practicing attorney who represents the Union in certain legal matters, not including the instant case.

⁴ Lucas had a right to appeal this dismissal of the charge to the General Counsel's Office of Appeals pursuant to Sec. 102.19 of the Board's Rules and Regulations.

P.O. Box 61103 Boulder City, NV. 89006-6103

cc: Mr. ROBERT ZENTZ Attorney at Law 626 So. Third Street LAS VEGAS, NV. 89101

[GC Exh. 8]

Appended to Lucas' letter to Kist was a second letter written by Lynn D. Larson, Ph.D. This letter also dated March 3, reads as follows:

Mr. Dennis Kist, Esquire President IATSE Local 720 Stagehand 3000 S. Valley View Blvd. Las Vegas, Nevada 89102

Dear Mr. Kist:

Please be informed that Mr. Steven Lucas has voluntarily presented at my office for psychological assessment regarding suitability for employment through his union. He indicated that his mental and emotional stability has been questioned by the Stagehand's Union, resulting in non-assignment of jobs and restriction in employment through the union.

Mr. Lucas was informed that psychological testing would only be provided in an objective and professional manner, and that there was no way of assuring him that the results would be beneficial in supporting his employment suitability. The patient still agreed to engage in the assessment process.

From February 22nd through February 28th, the patient was given the following procedures according to generally accepted administrative standards: Clinical Interview, Mental Status Examination, Bender Gestalt, SCL-90-R, Beck Depression Inventory, Minnesota Multiphasic Personality Inventory-2, Million Clinical Multiaxial Inventory-2, and the Shipley Institute of Living Scale.

In brief summary, the profile obtained from these procedures indicated that Steven Lucas is above-average in intellectual ability with good analytical reason skills. He responded to the procedures in an open and candid manner, which produced valid results. None of the test results revealed signs of psychopathology. The basic clinical scales on the MMP1-2 and the syndrome scales on MCMI-2 were within normal limits. The profile suggests that Mr. Lucas is self-confident and strives to achieve desired goals. There should be no reason, from a psychological stand point, that Mr. Lucas should not be considered fit and able to be employed at this time. If you should have any further questions, please do not hesitate to contact me.

Sincerely,

/s/ Lynn D. Larson, Ph.D. Lynn D. Larson, Ph.D. Clinical Psychologist, NV PY137 In his testimony, Lucas explained how Dr. Larson, who did not testify, came to write her letter. According to Lucas, in early 1995, he went to the union hiring hall where he attempted to sign the out-of-work list for subsequent dispatch to an employer. An unnamed union employee refused to allow Lucas to sign in and allegedly questioned his emotional and mental stability. Lucas then went to the county health department to seek a psychological evaluation. Informed that such evaluations were not available, Lucas was instead referred to Dr. Larson, to whom Lucas paid \$500 for the evaluation.

About the same time, Lucas contacted an official of AVW by letter and by phone.⁵ According to Lucas, he had been name requested by and dispatched to AVW in the past and he desired the same procedure for March. Accordingly, in the letter Lucas wrote to Mark Podany of AVW at their main office in Dallas, Texas, Lucas wrote of his availability for work at the upcoming National Association of Broadcasters Convention in Las Vegas (GC Exh. 11).

To introduce a response to Lucas' letter from AVW, the General Counsel called as its witness, Emmett Herman, general manager of AVW's Las Vegas branch. The response was authored by Mike Barnes, AVW's vice president located in Dallas, who did not testify. Pursuant to practice between AVW and the Union, Barnes' name requested Lucas and several others to perform certain work at the NAB convention (GC Exh. 9).

Notwithstanding the letter of Dr. Larson and the name request for Lucas by AVW, Lucas was not referred out to AVW or to any other job on the grounds that he had been permanently expelled from the Union's hiring hall in May 1994.

3. Procedure

At the conclusion of the hearing, I allowed the record to remain open pending the General Counsel's decision on whether to seek enforcement of its subpoena duces tecum. On March 27, 1996, the General Counsel advised in "Counsel for

⁵ Several documents contained in the record attest to the collective-bargaining relationship between AVW and the Union:

⁽¹⁾ The collective-bargaining agreement between Production Services Contractors Association of Las Vegas and the Union (1990–1994) (GC Exh. 4).

⁽²⁾ A Memorandum of Agreement dated December 6, 1990, between AVW and the Union reflecting AVW's acceptance of and assent to GC Exh. 4 (GC Exh. 5).

⁽³⁾ A current Memorandum of Agreement between the same parties as (2) above (GC Exh. 6).

⁶ Over Respondent's objection, I admitted Barnes' letter as a business record after Herman provided the necessary foundation: Document kept in the normal course of AVW's business; entries on the document made in the normal course of AVW's business; and entries on document are true and correct to the best of witness' knowledge. See Rule 803(6) FRE.

⁷ Under terms of the collective-bargaining agreement, employers using the hiring hall were permitted to submit without explanation "no rehire" letters for certain individuals. This meant the Union was bound not to dispatch a person named in such a letter to that employer. Apparently, prior to May 1994, certain employers had submitted no rehire letters to the Union naming Lucas, but the parties stipulated that no such letter was ever sent by AVW to the Union naming Lucas.

General Counsel's Motion to Close Record and Set Briefing Schedule," that he had been advised by Respondent in a letter attached to the motion that it did not intend to comply with the subpoena duces tecum absent a court order. Notwithstanding Respondent's position, the General Counsel decided against enforcement, and I consider below the question of whether an adverse inference is appropriate for Respondent's lack of compliance. By Order of April 3, 1996, I closed the record and set a briefing schedule.

B. Analysis and Conclusions

1. The 10(b) issue⁸

Section 10(b) of the Act provides that "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made." It is therefore a statute of limitations which extinguishes liability for unfair labor practices committed more than 6 months prior to the filing of the charge. *NLRB v. Fant Milling Co.*, 360 U.S. 301, 309 fn. 9 (1959). The 10(b) period commences only when a party has clear and unequivocal notice of a violation of the Act and the burden of showing that the charging party was on clear and unequivocal notice of the violation rests on Respondent. *Oliver Insulating Co.*, 309 NLRB 725, 726 (1992).

As set forth above, the charge triggering the instant case was filed on March 16. If Respondent has proven that the acts which gave rise to the charge occurred more than 6 months before March 16, the case is ended and Respondent wins. If Respondent has not met its burden of proof, I will proceed to consider other issues.

At first blush, it appears that Respondent has not met its burden, for the facts show Lucas was aggrieved by events occurring less than a month before Lucas filed the charge. The charge reads that "[d]uring the last 6 months, and continuing to date, the above-named labor organization has operated its hiring hall in an unlawful and discriminatory manner, including barring Steven Lucas from use of the hiring hall and arbitrarily denying him work referrals." (GC Exh. 1(a).)

Respondent contends, however, that the March 16 charge in effect is equivalent to the May 16, 1994 charge recited above, (R. Exh. 1), which the Regional Director investigated and dismissed. I reject this argument as lacking in merit because I cannot find that Respondent has met its burden of proof. That is, there is no proof that Lucas knew or should have know in 1994 that not only was he barred permanently from use of the Union's hiring hall, but also that Lucas could do nothing to change the Union's position.

With respect to the letter of Dr. Larson, which Lucas submitted to the Union as proof of his changed circumstances, the Union had a fiduciary duty to consider Dr. Larson's evaluation on its merits. Had the Union done so and then rejected Lucas, I might see the issue differently. At page 3 of its brief, Respondent depreciates the letter of Dr. Larson as having no probative value since it was not admitted for the truth of the matters as-

serted. I agree with this contention but it misses the significance of the letter to this case. In my opinion, the letter creates the appearance of new circumstances from which the new charge draws vitality.

In the alternative, I assume for the sake of argument that Lucas' March 16 charge is inextricably intertwined with the May 16, 1994 charge. Even then, I would not find a bar to the instant case because Respondent again has not met its burden of proof to show notice. Surely, the June 30, 1994 letter to Lucas from the Regional Director (R. Exh. 2) is not unequivocal notice to Lucas either of what he is supposed to have done or that his expulsion is in perpetuity. To be sure, Lucas referred in his testimony to phone calls in 1994 from unidentified union members relating to him rumors of what he was supposed to have done to justify the Union's expulsion action. Rumors are not unequivocal notice to Lucas. Electrical Workers IBEW Local 25 (Spectacore Managemen), 316 NLRB 932 (1995). Finally, the fact that certain employers may have filed no rehire letters with the Union regarding Lucas is not notice to Lucas. The fact is that at least one employer, AVW, was willing to rehire Lucas and name requested him from Respondent to no avail.

In light of the above, I reject Respondent's 10(b) defense. Compare *John Morrell & Co.*, 304 NLRB 896 (1996).

2. Alleged unlawful refusal to register and to refer Lucas

I begin by reaffirming that Respondent's expulsion of Lucas from its hiring hall is not before me and I therefore express no opinion as to its legality.

Focusing instead on Lucas' attempt to re-register in the hiring hall in March, I find first that Respondent operated an exclusive hiring hall as has been admitted. 10 Next Respondent owes a duty of fair representation to applicants (or registrants) using the hall (or attempting to use the hall). Iron Workers Local 118 (California Erectors), 309 NLRB 808, 811 (1992). As part of its duty of fair representation, a union has an obligation to operate the exclusive hiring hall in a manner that is not arbitrary or "unfair." Stage Employees IATSE Local 412 (Various Employers), 312 NLRB 123, 127 (1993). The duty of fair representation also requires the union not only to refrain from arbitrary refusals to permit registration for a hiring hall (citation omitted) but also to inform workers of relevant rules. Boilermakers Local 374 v. NLRB, 852 F.2d 1353, 1358 (D.C. Cir. 1988). No specific intent to discriminate on the basis of union membership or activity is required; a union commits an unfair labor practice if it administers the exclusive hall arbitrarily or

⁸ Respondent's affirmative defense was not originally pled in its answer, but was added by amendment during the hearing (Tr. 15).

⁹ Since the General Counsel does not so argue, I do not decide here whether the General Counsel could have reinstated the May 16, 1994 dismissed charge based upon the Dr. Larson letter, or on other evidence. See *California Pacific Signs*, 233 NLRB 450 (1977); *Public Service Planning & Analysis Corp.*, 243 NLRB 1076 (1979); and *Sonicraft, Inc. v. NLRB*, 905 F.2d 146 (7th Cir. 1990). In addition, I decline to discuss *Lotus Suites, Inc.*, 309 NLRB 1313 (1992), since Respondent presents no argument in its brief, based on that case. Moreover, I find that *Lotus Suites, Inc.* has no application to the issue discussed in this segment of the case.

¹⁰ In *Plumbers Local Union 198 (Stone & Webster)*, 319 NLRB 609, 612 (1995), the judge explained that an exclusive hiring hall is one where all employees hired by an employer are those from referral by the union

without reference to objective criteria and thereby affects the employment status of those it is expected to represent. By wielding its power arbitrarily, the Union gives notice that its favor must be curried, thereby encouraging membership and unquestioned adherence to its policies. Id. at 1358.

In *Stage Employees IATSE Local 412*, supra, 312 NLRB at 127, the judge expressed the applicable legal principle in slightly different terms:

Where a union causes, attempts to cause, or prevents an employee from being hired or otherwise impairs the job status of an employee, it demonstrates its power and influence over the employee's livelihood so dramatically as to compel an inference that the effect of the union's actions is to encourage union membership on the part of all employees who have perceived the display of power. A union may overcome this inference or rebut this presumption, by proving that the action was necessary to the effective performance of its function of representing its constituency. See, e.g., Teamsters Local 456 (Louis Petrillo Corp.), 301 NLRB 18 at 22 (1991).

In light of the above, was it arbitrary for the Respondent here to refuse to register Lucas on the grounds that he had been permanently expelled from the hiring hall in May 1994 in a decision which cannot be legally challenged in this proceeding. The question can be framed in different terms: Was the Union's action necessary to the effective performance of its function in representing its constituency? *Plumbers Local 40 (Mechanical Contractor)*, 242 NLRB 1157,1160–1161 (1979), affd. 642 F.2d 456 (9th Cir. 1981). For the reasons stated below, I find that it was arbitrary and unfair for Respondent to refuse to register Lucas and said refusal was not necessary to the effective performance of Respondent's function in representing its constituency.

(a) Respondent has presented no credible evidence nor persuasive argument to rebut the presumption that the effect of refusing to re-register Lucas in its hiring hall is to encourage union membership on the part of all employees who have perceived the Union's display of power. In sum, Respondent's argument that because Lucas may have been disruptive and combative in 1994 means that he will always be this way does not follow. The Union's position amounts to a permanent irrebutal presumption of unfitness to use the Union's hiring hall: the proposition, once unfit, always unfit must be rejected.

In another context, the U.S. Supreme Court has opined that permanent irrebutable presumptions have long been disfavored under the Due Process Clause of the Fifth and Fourteenth Amendments. To be sure, the Fifth and Fourteenth Amendments are not implicated in the instant case because there is no state action involved. Yet, the permanent irrebutable presumption created by the Union's action denies Lucas any possibility

of redemption or rehabilitation and must be rejected as contrary to the letter and spirit of Board law. ¹²

(b) Respondent has operated its exclusive hiring hall without any objective standards and at the whim of those handling the referral service in violation of the Act. *Teamsters Local 174 (Totem Beverages)*, 226 NLRB 690, 699–700 (1976). Under the circumstances present here, where union officials decided to ignore the letter of Dr. Larson and refused to refer Lucas, even where he was specifically requested by AVW, Respondent violated both Sections 8(b)(2) and (1)(A) of the Act. (Id. at 698.) Moreover, if the letter of Dr. Larson was inadequate to show fitness for re-registration, Respondent failed to tell Lucas what other evidence he could present to qualify for access to the hiring hall. Cf. *Plumbers Local 230*, 293 NLRB 315 (1989).

(c)Respondent has failed to comply with General Counsel's subpoena duces tecum. Prior to hearing, the General Counsel caused a subpoena duces tecum (B-161026) to be served on the Respondent demanding that certain documents be produced at hearing (GC Exh. 2). Described in 19 separate paragraphs, the documents in question were not produced, although it is far from clear what documents described in the subpoena actually exist. Among the documents which apparently do exist are the minutes of one or more executive committee meetings held in May 1994, in which the expulsion of Lucas was discussed.

Respondent received the subpoena duces tecum on February 26 (GC Exh. 14). No motion to quash nor motion to modify the subpoena duces tecum was ever filed by Respondent. Instead, towards the end of the 1-day hearing, counsel for Respondent boldly stated, he did not intend to comply with the subpoena duces tecum (Tr. 234). Among the reasons cited by counsel for noncompliance was that he didn't have a full 5-day notice as provided by the Board's Rules and Regulations to file a motion to quash or modify. The short answer to this contention is that Respondent never asked for additional time in which to file such a motion. Moreover, Respondent made it perfectly clear that no matter how I may have ruled on such a motion, Respondent would not comply since in Respondent's view, none of the documents were needed for the simple issue involved in the case (Tr. 235-237). In any event, Respondent's 5-day argument is foreclosed by Packaging Techniques, Inc., 317 NLRB 1252, 1253-1254 (1995), where the judge pointed out that a subpoena may be returnable in less than 5 days from service, where necessary to satisfy Section 102.35 of the Board's Rules and Regulations giving the judge the authority to regulate the course of the hearing.

As to whether this Respondent or any party to any case can decide for itself whether to comply with a presumably valid subpoena duces tecum, which has been properly served, I find

¹⁴ A union may also show it was acting pursuant to a valid union-security clause; however, such is not an issue herein.

¹¹ Stanley v. Illinois, 405 U.S. 645 (1972); Vlandis v. Kline, 412 U.S. 441, 446 (1973); Cleveland Board of Education v. LeFleur, 414 U.S. 632, 644–645 (1974).

¹² Suppose for the sake of argument Respondent is correct in its contention that the basis for the executive board's decision in 1994 and its defense to the instant case are the same. (Tr. 212): That Lucas was so disruptive, so emotionally unstable that he was beyond rehabilitation. Under these circumstances, the *Americans with Disabilities Act*, 42 U.S.C. §12101 et. seq., and the *Rehabilitation Act of 1973*, 29 U.S.C. §791 et. seq., may be implicated in Respondent's permanent bar without reasonable accommodation. In light of my decision under the Act, these issues need not be considered.

that such discretion would hobble if not destroy the process under which we labor. Therefore, I draw an adverse inference from Respondent's failure to comply with the General Counsel's subpoena duces tecum. In Auto Workers v. NLRB, 459 F.2d 1329, 1340 (D.C. Cir. 1972), the court discussed at length the adverse inference rule regarding a party's failure to produce documents. At page 1338, the court stated, "But while the adverse inference rule in no way depends on the existence of a subpoena, it is nonetheless true that the willingness of a party to defy a subpoena in order to suppress the evidence strengthens the force of the pre-existing inference." Compare, Riverdale Nursing Home, 317 NLRB 881 (1995), where the Board found that the judge's use of the adverse inference rule to fill an evidentiary gap proving joint employment status "sweeps too broadly." In the instant case, by contrast, I find that the General Counsel has proven a prima facie case by undisputed facts. The adverse inference which I draw from Respondent's noncompliance with the subpoena merely corroborates and reinforces General Counsel's prima facie case, but does not establish it, even in part.

3. Lucas' alleged misconduct in stealing documents from his personal file kept at the union hall

During the trial, Respondent raised an issue regarding Lucas' alleged theft of certain documents from his file kept at the union hiring hall. The exact date of this alleged theft was not established except that it supposedly occurred prior to the original decision to bar Lucas from use of the hiring hall (Tr. 180). In his testimony, Lucas denied any such unauthorized removal of documents from his file. However, during crossexamination by counsel for Respondent, Lucas behaved and testified in a way that caused me to doubt his denials and I therefore undertook an unusual procedure. With the permission of both sides and Lucas himself, I requested the General Counsel, to sort through documents in Lucas' voluminous briefcase in an attempt to identify any material which could have been taken from the Union's file and to perform this task outside the presence of Respondent's counsel. The General Counsel did as requested, and arranged the documents into two categories: the first clearly unrelated to any issue in this case was then placed back into Lucas' briefcase; and the second raising a question in the mind of the General Counsel as to where Lucas had obtained the documents, was turned over to Respondent's counsel, who first cross-examined Lucas as to the source of the documents and ultimately offered the documents as Respondent Exhibit 4 as proof of the alleged theft (Tr. 197).

In refusing to admit Respondent's Exhibit 4, I found at hearing and reaffirm here that said offer was irrelevant to any issue in the case. So far as I can tell from this record, Lucas was not barred from use of Respondent's hiring hall for stealing documents from his file. He was expelled in May 1994, based on an (alleged) long history of misconduct, complaints from employers, complaints from coemployees (Tr. 103). Respondent's defense to the instant case is based on the same factors (Tr. 212). Notwithstanding the apparent irrelevancy, I will assume without finding that Lucas did take certain documents from his file at the union office. Respondent's counsel was able to show in Lucas' possession a number of original documents relating to

Lucas; Lucas' explanation on cross-examination as to how he came into possession of these documents was not convincing.

So the question is, what difference, if any, do my suspicions raise, with respect to the violations of the Act which the General Counsel has otherwise established. The answer is no difference whatsoever. See *Goodyear Tire & Rubber Co.*, 271 NLRB 343, 346 fn. 10 (1984) (citation omitted). ("Clean hands doctrine of equity does not operate against a charging party (or alleged discriminatee) since proceedings such as this are not for the vindication of private rights but are brought in the public interest and to effectuate statutory policy".)

In light of the above, I conclude that Respondent has failed to meet its burden of establishing adequate justification for permanently barring Lucas from using its exclusive hiring hall system and for refusing to re-register him in March. Accordingly, Respondent's action violates Section 8(b)(1)(A) and (2) of the Act and I so find. 13

CONCLUSIONS OF LAW

- 1. International Alliance of Theatrical Stage Employees and Moving Pictures Machine Operators of the United States and Canada, Local 720, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.
- 2. AVW Audio Visual, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
- 3. On or about December 6, 1990, AVW Audio Visual, Inc. and the Union entered into, and has since that date maintained, a practice and/or arrangement requiring the Union to be the sole and exclusive source of referrals of employees to employment with AVW.
- 4. By permanently barring Steven Lucas, since on or about March 22, from using its referral system, the Union has been, and is, engaging in unfair labor practices within the meaning of Section 8(b)(1)(A) and (2) of the Act.

REMEDY

Having found that the Respondent has violated Section 8(b)(1)(A) and (2) of the Act, I shall recommend that Respondent be ordered to cease and desist from such conduct and that it take affirmative action designed to effectuate the policies of the Act.

Having found that the Respondent unlawfully denied Steven Lucas referral to AVW Audio Visual, Inc., I shall recommend that Respondent be ordered to make him whole for any loss of

¹³ After this decision had been prepared in draft form, I received a letter dated June 3, 1996, from Attorney David A. Rosenfeld, enclosing an unpublished decision of the 9th Circuit Court of Appeals in *NLRB v. Grimway Farms* (Docket #94–70511, 5/8/96). The court had refused to enforce a potion of a Board decision and Rosenfeld argued the court's rationale supported his theory in the present case. While I seriously question the propriety of citing an unpublished decision of a U.S. Court of Appeals in a Board proceeding, I find the case is unavailing on its merits. First, I am bound by Board law where there is a conflict with a reviewing court. *Iowa Beef Packers, Inc.*, 144 NLRB 615, 616–617 (1963). Moreover, at p. 616, the court recited that the employer had notified terminated employees that they were ineligible for rehire. In the instant case, no such notice was given by Respondent to Lucas in 1994 that he was ineligible to ever use its hiring hall again.

earnings suffered as a result of this unlawful conduct by paying him backpay equal to the amount of wages that he would have earned had he not been unlawfully denied referral to AVW Audio Visual, Inc. since March 22, 1995, less net interim earnings. Backpay and interest are to be computed in the manner set forth in *New Horizons for the Retarded*, 283 NLRB 1173

(1987). It will be left to compliance proceedings for the determination of the nature and extent of Lucas's employment opportunities at AVW Audio Visual, Inc. after March 22, 1995, the date Respondent failed to refer Lucas.

[Recommended Order omitted from publication.]